operations". It should be made clear that where an allowance falls to be made under paragraph 75 of Schedule 3 of the Principal Act which provides for an allowance to be wholly or partly carried forward where there is insufficient or no profit, such "carried forward" allowance may not be deducted from the calculation of the "timber profits". In other words, capital allowances, plantation allowances in respect of one business cannot be given as deductions in computing the income of another business. That is the purpose of paragraph 75 of Schedule 3. Furthermore, section 26 of the Supplemental Income Tax Act provides that certain provisions of the Principal Act, such as, sections 4, 5 and 43(1)(a) and (2) do not apply to timber profits tax.

Only revenue expenditure is allowed to be deducted from a source to ascertain adjusted income. Under Schedule 3 of the Principal Act capital allowances are given to a person who, in the pursuit of business, has incurred qualifying capital expenditure on, say, (a) plant and machinery; (b) industrial buildings; (c) plantations and (d) forests.

The allowances given are deducted in ascertaining his statutory income from each business source. He must make a claim for capital allowances due at the time on filing his return. He can claim allowances *only* under any one of the above headings in respect of the same qualifying expenditure. For instance, if industrial building allowance has been claimed, no plantation allowance or any other allowance can be claimed in respect of the same expenditure.

Capital allowances are given in respect of each business which has incurred qualifying expenditure. For instance, in running a plantation a person would have to incur capital expenditure in —

(i) clearing land for planting of approved crops;

(ii) planting approved crops on the land cleared;

(iii) constructing roads on the estate; and

(iv) constructing buildings in the estate for the welfare and the accommodation of those working in the estate.

By "estate" we mean not only plantation for growing approved crops only but land adjacent to or in the vicinity of that plantation which is occupied for the purpose of a business which consists wholly or partly of the working of that plantation.

In the same way a person, engaged in carrying on a business which consists wholly or partly of the extraction of timber under a concession or licence, is entitled to claim a capital allowance called "forest allowance". This allowance is given as he would incur capital expenditure in extracting timber in a forest by constructing: —

(a) roads; or

(b) buildings in the forest for the welfare and accommodation of persons employed in the extraction of timber.

Under paragraph 31 of Schedule 3 of the Principal Act, if a person ceases his business permanently in a certain year he can claim a forest allowance for that year any balance of qualifying forest expenditure not yet claimed as such allowance in that year. On the other hand, under paragraph 32 of the said Schedule 3 where such a person disposes of a forest, then, any allowance which has been made to him is added back to his gross income as a "forest charge". A person having a concession or licence for timber extraction from a forest who assigns or transfers it or surrenders it for valuable consideration is taken to have disposed of a forest for the purpose of paragraph 32 of the said Schedule. We are not concerned with the disposal price as it has no bearing on the imposition of a "forest charge". In calculating the timber profits tax as mentioned earlier certain provisions of the Principal Act do not apply.

Since we agree with the Revenue that there are actually two separate businesses, we consider that the deciding order of the Special Commissioners should be varied, particularly in respect of Dagat and Tenggara by merging into one item. The deciding order should read as follows: —

(i) Appellant's operations at Litang Estate, Tomanggong Estate and Malubok Estate constituted a business and each estate was a separate source of income.

(ii) Appellant's timber operations at Dagat and Tenggara constituted another business and each was a separate source of income.

In other words, there were two separate businesses deriving income from five sources. Subject to this variation we would uphold the decision of both the Special Commissioners and the learned judge. Accordingly, we would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

*Appeal dismissed.*

Solicitors: *Shelley Yap Chong Chia & Co.*

## FABER MERLIN MALAYSIA BHD. v. BAN GUAN SDN. BHD.

**[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) June 25 & September 20, 1980]**

**[Kuala Lumpur — Federal Court Civil Appeal No. 89 of 1979]**

*Practice and Procedure — Application for inspection of documents — Building contracts — Claim by contractor admitted and only quantum disputed — "Tens of thousands" of documents — Documents relevant to claim — Rules of High Court, 1980, O. 24, rr. 4(1) & 13(1).*

The respondent, a contractor, claimed payment for work done by him. The appellant admitted the claim but disputed the quantum. The respondent applied for discovery and inspection of documents but the appellant objected on procedural grounds. An order was made in the High Court. The appellant appealed.

**Held:** as on the pleadings the issue was the quantum of the claim, the documents, the tens of thousands of them in the appellant's possession notwithstanding, must be produced for its proper ascertainment, because they are relevant to it.

*Case referred to:-*

(1) *Chai Yen* v. *Bank of America etc.* [1980] 2 M.L.J. 142.

FEDERAL COURT.

*Wong Weng Kwai* for the appellant.

*K. Thayalan* for the respondent.

*Cur. Adv. Vult.*

**Chang Min Tat F.J.** (delivering the judgment of the Court): This appeal is from the decision of the learned judge, confirmed after argument in open court, to order inspection of documents stated to be

(a) bills and invoices and contracts made between the defendant and all its nominated sub-contractors in relation to the extension of the Tower Block of Hotel Merlin;

(b) records of wages of defendant's workmen and all bills and invoices for the purchase of materials directly by the defendant in relation to the extension of the Tower Block of Hotel Merlin;

on an application by the respondent.

The respondent was the contractor but apparently not the only contractor for the appellant in the erection of the Tower Block Extension to Hotel Merlin Kuala Lumpur. Strangely for a matter that ran into millions of dollars, no formal building agreement was entered into. The parties were said to be bound by a schedule of rates, payment to be made on measurements taken after completion. The contractor's claim for such measured work on the Tower Block was for $2,106,705.69 but settled for $2,075,000. The contractor however claimed also for $175,550 for preliminaries and $422,336.12 for profit and attendance on P.C. sums. These claims are outstanding. The claim for profit and attendance on P.C. sums is based on bills available to the contractor for work carried out by other contractors to which he says he is, as the main contractor, entitled, but he also says there were other works done by other contractors in respect of which he has not the bills and he is therefore unable to quantify this sum. He believes that he is entitled to more than $422,336.12. He has another claim, for $215,107.42 for other miscellaneous work. It is in respect however of those other contractors, the details of whose work he is unaware of, that he sought inspection. He must know these details before he can quantify his claim for such further sum as may be found due to him on this count.

The defence, insofar as it concerned this claim for profit and attendance on P.C. sums in respect of which the order for discovery was made and which constitutes the subject-matter of this appeal, first accuses the contractor of being inconsistent in his claim and then in paragraphs 7 and 8 of the defence,

"7. The defendant says that the architect firm of Messrs. Eric Taylor dan Rakan Rakan, the architects having charge of the work related to the said Tower Block, had on diverse occasions repeatedly pointed out to both the plaintiff and the defendant that no proper award or acceptance of tender was ever made by the defendant in respect of the plaintiff's claim for Preliminaries and Profit and Attendance and that the said architects never authorised or supervised such works.

8. The defendant further says that despite repeated requests the plaintiff failed and/or refused to substantiate its claim by submitting proper details and documents in support therefor."

With respect, it seems to us on a reading of these two relevant paragraphs of the statement of defence that there is no denial of the claim by the contractor that he is entitled to the claim for profit and attendance on P.C. sums in respect of work done by other contractors. If this view is correct, it must decide the issue of discovery and inspection of the documents in the possession of the defendant in respect of such work in favour of the contractor.

But the defendant objects to the application purely on procedural grounds. It says the contractor should have asked for a further and better list, alternatively, for an affidavit as to specific documents. He could also ask leave to direct interrogatories to the defendant.

The defendant's contention is not without apparent persuasion. But, if the contractor had done what it was suggested he should do, then the failure of the defendant, to deny either that the contractor was entitled to this head of claim or that there was no such work done or alternatively, if it should be the case, that the contractor was entitled, but the claim had been settled, and the contractor was not entitled to reopen the issue, it must mean that eventually the order for production of the documents in the possession of the defendant would be made.

But as observed, there is neither this denial nor this averment in the statement of defence. Nor in the affidavit filed in opposition to the application. All that this affidavit says is:

"3. Over the past 10 years the defendant company had carried out erection of buildings, renovation and other construction works in connection with the Tower Block of Hotel Merlin, Kuala Lumpur.

4. Some of these works were carried out by other contractors as well as employees of the defendant company and some were carried out by the plaintiff company.

5. There are tens of thousands of contracts, bills, invoices, delivery orders relating to the Tower Block.

6. Under the circumstances it would not be practicable if not impossible to comply with the demand of the plaintiff company for all bills and invoices and record of wages to be opened for inspection."

Not one word is said that the contractor is not entitled as he claims to the profit and attendance on P.C. sums.

By the ordinary rules of pleadings, especially Order 18 rule 13, Rules of the High Court 1980, this must mean therefore an admission that the contractor is so entitled and if so, the only issue raised in this matter is the quantum of the claim.

Order 24 rule 13(1) Rules of the High Court 1980 provides that the court will order the production for inspection of any documents which in its opinion are necessary for disposing fairly of the cause or matter or for saving costs: see also *Chai Yen* v. *Bank of America, etc.*[1] (Compare Order 31 rule 18 Rules of the Supreme Court, 1957 where the same words are used).

If it be the case that discovery is tied to the question whether it is relevant to any issue or question raised on the pleadings, then the court may order the determination of that issue or question before deciding on the extent of the order for discovery: Order 24 rule 4(1) Rules of the High Court 1980. But where the issue or question is clearly raised in the cause or matter, then equally clearly the order for discovery must be determined by the consideration whether it is necessary at the stage of the application.

Therefore, if as a matter of pleadings, the issue is the quantum of the claim, then the documents, "the

tens of thousands" of them in the defendant's possession notwithstanding, must be produced for its proper ascertainment because they are relevant to it. The complexity or immensity of the task should not be a deterrence. Sooner or later, it will have to be undertaken and it should be done as a pre-trial measure rather than at the trial itself.

For these reasons, we dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: *Mah-Kok & Din; Skrine & Co.*

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## PUBLIC PROSECUTOR v. LIM JOO SOON

**[F.C. (Wan Suleiman, Syed Othman & Ibrahim Manan F.JJ.) October 6, 1980]**

**Kuala Lumpur — Federal Court Criminal Application No. 16 of 1979]**

*Criminal Law and Procedure — Appeal from subordinate court — Application by Public Prosecutor to reserve question of law of public interest for decision of Federal Court — Application dismissed by judge of High Court — Whether question one of law of public interest — Whether High Court bound to refer question on application of Public Prosecutor — Courts of Judicature Act, 1964, s. 66(1).*

In this case the Public Prosecutor had applied for certain questions which had arisen in an appeal from a subordinate court to be referred to the Federal Court as they were questions of law in the public interest. The learned Judge refused the application.

**Held:** where an application is made by the Public Prosecutor the court has no discretion to decide on whether the question of law is of public interest. In such a case on the clear purport of section 66(1) of the Courts of Judicature Act, 1964, it must be taken that any question posed by the Public Prosecutor is of public interest, unless of course it can be shown that the question is indeed of his own personal interest and no one else.

*Cases referred to:-*

(1) *Public Prosecutor* v. *Ismail Ishak & 59 Ors.* unreported.

(2) *Tan Yin Yen* v. *Public Prosecutor* [1973] 2 M.L.J. 143.

FEDERAL COURT.

*Sharkawi bin Alis* (Deputy Public Prosecutor) for the applicant.

*Raja Abdul Aziz Addruse* for the respondent.

*Cur. Adv. Vult.*

**Ibrahim Manan F.J.:** This is an application by the Public Prosecutor (applicant) for an order that:—

"(1) the Honourable Judge do reserve for the decision of the Federal Court the following questions of law:

(a) Whether it is competent in law for the learned judge to determine the classification of any goods where a certificate classifying such goods has been issued by the Director-General of Customs under section 22 of the Customs Act, 1967.

(b) If so, whether it is competent in law for the learned judge to determine the classification of such goods when an appeal against the decision of the Director General of Customs classifying such goods under section 22 of the Customs Act, 1967, is pending before the Honourable Minister of Finance under section 143 of the said Act

as questions of law of public interest, which have arisen in the course of the abovementioned Criminal Appeal and the determination of which will affect the event of the appeal.

(2) the time for this application made pursuant to section 66(2) be extended to such longer time as the Federal Court may deem fit.

(3) the Order made by the Honourable Judge on 30th August, 1979 be set aside."

Section 66(1) of the Courts of Judicature Act, 1964 reads as follows:—

"When an appeal from a decision of a subordinate court in a criminal matter, other than a decision of a President of a Sessions Court conferred with special jurisdiction under subsection (3) of section 63 of the Subordinate Courts Act, 1948, has been determined by the High Court the judge may on the application of any party and shall on the application of the Public Prosecutor reserve for the decision of the Federal Court any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal."

The only issue raised in this application is whether the two questions are questions "of law of public interest". It was the contention of the learned Deputy Public Prosecutor that since the application was made by the Public Prosecutor they were *ipso facto* such. The learned judge disagreed with him and though no written judgment was given by him for dismissing the application his reasons for doing so could, we believe, be gathered from his earlier judgment in *Public Prosecutor* v. *Ismail Ishak & 59 Ors.* (unreported) given on December 11, 1975. In that case the learned judge had also disagreed with the same contention made by the learned Deputy Public Prosecutor and in the course of his judgment in that case he said:

"... It seems to me that section 66(1) of the Courts of Judicature Act does not give the Public Prosecutor the automatic right to have all questions by him referred to the Federal Court or to put it in another way, a judge of the High Court is not bound to refer any question to the Federal Court merely because the application is made by the Public Prosecutor. He must first decide on the merits of the application itself.

I find support for this view from a passage by Suffian Ag. C.J. (as he then was) in *Tan Yin Yen's*[2] case, F.C. where his Lordship said:

'It is to be observed that questions of law which may be referred to us under section 66 should not be questions that are of personal interest only to the accused *or the Public Prosecutor*, but should be questions that are of public interest, and it seems to us better if the High Court were to exercise *their discretion* under section 66 *sparingly*, so that references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.' (The italics are mine.)"

With respect we do not agree with him. We are of the view that the word "shall" in the said section 66(1) in respect of any application by the Public Prosecutor, should be given effect to, and that the position here is the same as it is under the English Criminal Appeal Act, 1907. The Public Prosecutor's application coming as it is from such an august officer of the law removes from the discretion of the court the right to decide on whether the question of law is of public interest. When the Public Prosecutor applies for reference, on the clear purport of the said section 66(1), it must be taken that any question posed by him is of public interest, unless of course it can be shown that the question is indeed of his own personal interest and no one else.

We would therefore allow this application. As to prayer 2 we would extend the time to 2 weeks from to-day.

*Application allowed.*

Solicitors: *Rithaudeen & Aziz.*